

IN THE COURT OF APPEALS 7/29/97

OF THE

STATE OF MISSISSIPPI

NO. 93-CA-01037 COA

DAWKINS & COMPANY APPELLANT

v.

**L & L PLANTING COMPANY, JAMES P. LOVE,
JR., THE ESTATE OF J. P. LOVE, THE ESTATE OF
CLYDE GOSNELL, LOVE & LOVE FARMS, INC., J.
P. L. FARMS, INC. AND GOSNELL FARMS, INC. APPELLEES**

**THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B**

TRIAL JUDGE: HON. GRAY EVANS

COURT FROM WHICH APPEALED: HOLMES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: L. CARL HAGWOOD

R. BRITTAIN VIRDEN

ATTORNEY FOR APPELLEE: JOHN WILLIAM BARRETT

H. D. BROCK

NATURE OF THE CASE: BREACH OF CONTRACT

TRIAL COURT DISPOSITION: J.N.O.V. GRANTED FOR DEFENDANT

ON PETITION FOR REHEARING

EN BANC

SOUTHWICK, J., FOR THE COURT:

The opinion of September 17, 1996 is withdrawn and this opinion is substituted.

Dawkins & Company received a jury verdict in its suit for breach of a contract for the sale of cotton. The Defendants, collectively "L & L Planting," successfully moved for a judgment notwithstanding the verdict. Dawkins contends that the trial court erred in setting aside the verdict. We agree that the trial court erred regarding some of the stated reasons for the J.N.O.V., but also find that the jury was given neither the proper evidence nor the proper instructions for calculating damages. We reverse and remand for additional proceedings solely regarding damages.

FACTS

After doing business with each other for several years, Dawkins and L & L Planting made an agreement concerning the forward sale of cotton during 1986 through their respective principals, H. L. "Jim" Dawkins, Jr. and J. P. Love, Sr. Love called Dawkins on August 22, 1986, and agreed to sell cotton for two cents per pound to be paid by Dawkins. The remainder would be paid through a government price support program that will subsequently be described, but which would give Love an additional 55.95 cents per pound. Under that federal program, what Dawkins would have to pay for the cotton would not be known until the time of delivery, which was required by January 15, 1987. Dawkins was simultaneously selling cotton to a Japanese company, Sumitomo Corporation, which was to take delivery of the cotton before mid-December, 1986. For those contracts Dawkins knew his cost -- 29.5 cents per pound. There were numerous purchase contracts that Dawkins entered, and large numbers of sales contracts. Dawkins's significant and difficult economic chore was to balance the unknown fluctuations in the market over the next four to five months, the likely quantities of cotton to be delivered from the various crops that he purchased, the complexities of the new government program, and Dawkins's obligations to deliver cotton to his buyers by certain dates.

A Dawkins employee was sent to meet with Love and obtain his signature on a contract that memorialized the agreement. Love did not sign and instead told the employee to meet with Love's son. Love's son indicated that he needed to do further market research before he signed. Love died on September 14, 1986, about three weeks after the phone call agreement. Dawkins made repeated efforts to contact Love's son to confirm that L & L Planting would honor its agreement. Dawkins finally reached the younger Love on October 8, 1986. The son told Dawkins that he would not deliver the cotton and that it had been sold to another company.

Despite this news, Dawkins never attempted to cover his loss from the repudiated contract. He said that he was concerned that L & L Planting might still hold him to the agreement. While he waited, the cotton market was exceptionally active. Contrary to expectations, the price of cotton rose in the waning months of 1986. The results for Dawkins were severe in December 1986, when Sumitomo finally made demand on him for their cotton. Unable to provide Sumitomo with all of the cotton that he had agreed to sell, Dawkins paid significant penalties.

Dawkins brought suit against L & L Planting for his damages. In 1989 the circuit court granted summary judgment to L & L based on the statute of frauds. The supreme court reversed, finding there to be genuine issues of material fact that precluded summary judgment on that question. *Dawkins & Co. v. L & L Planting Co.*, 602 So. 2d 838, 844 (Miss. 1992). After remand a two-day jury trial was held. On special interrogatories, the jury awarded Dawkins damages of \$369,899.60. The trial court granted a J.N.O.V. to L & L Planting.

1. The Form of the Verdict

We first consider a preliminary matter necessarily implicated by this case. The verdict was obtained by a combination of standard jury instructions and a set of special interrogatories to the jury. The Mississippi Rules of Civil Procedure provide:

The court, in its discretion, may submit to the jury, together with instructions for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers and to render a general verdict.

M.R.C.P. 49(c). *See, generally, Jones v. Westinghouse Electric Corp.* (94-CT-01124-SCT June 5, 1997). In this case, the special verdict form is prefaced with several paragraphs of definitions and explanations. However, while the issue of Love's competency is the subject of one of the separate *general* instructions, competence is not an issue contained in the *special* verdict form for the jury to consider in its step by step answering of questions on liability and damages. Thus, we are faced with reconciling the absence of an express consideration of competency in the verdict form and the presence of general instructions explaining the law of competency.

The court gave a general instruction that provided Love would not be bound by a contract if he was not competent at the time of the phone call. This is not reiterated in the special interrogatories. In fact, the trial court gave the following instruction to the jury:

Before I discharge you, I want to explain something to you. You have been given a set of interrogatories here; that is, a set of questions which we . . . have asked you to answer.

* * * *

I suggest to you that you first consider[] all the testimony and all the other instructions applicable to this question, that you proceed to answer the interrogatories as set forth in this [i]nstruction . . . I'm going to put that on top. You should proceed to answer the questions in sequence, one through five.

* * * *

You should mark your answer in the appropriate space, knock on the door and come back before the Court and announce that decision.

If the jurors were listening, and we assume they were, this meant they should answer the special verdict questions regardless of any other issues. In fact, the special verdict form was the only place for the jury to indicate a verdict.

It may be argued that the requirement that a finding of competence be made is implicit since the interrogatories require the jury to find that a contract had been formed on August 22 prior to examining the other issues in the case. Specifically, interrogatory number three appeared as follows:

[D]o you find from a preponderance of the evidence that there was a contract for the forward sale of L & L Planting Company's 1986 Cotton Crop to Dawkins and Company entered into in the telephone conversation between J. P. Love and Jim Dawkin[s] on August 22, 1986?

YES _____ X _____ NO _____

However, the question does not refer the jury to the issue of Love's competency as a factor for determining whether a contract had been entered into.

To be sure, interrogatories are a useful tool for obtaining jury verdicts. In this case, without an express inclusion of the general instructions as a part of the jury's deliberations, the validity of the verdict itself as a reflection of all of the applicable law is questionable. We will not here reverse on an issue not presented to us by the parties. If they were satisfied with the form, we will be also for purposes of our decision. We consider the merits of the appeal.

2. *Standard of Review*

Our standard of review in examining granted motions for a J.N.O.V. is well-established.

The motion for J.N.O.V. tests the legal sufficiency of the evidence supporting the verdict. It asks the court to hold, as a matter of law, that the verdict may not stand. Where a motion for J.N.O.V. has been made, the trial court--and this Court on appeal--must consider all the evidence--not just the evidence which supports the non-movant's case--in the light most favorable to the party opposed to the motion. The non-movant must also be given the benefit of all favorable inferences that may be drawn from the evidence. If the facts and inferences so considered point so overwhelmingly in favor of the movant that reasonable men could not have arrived at a contrary verdict, granting the motion is required. On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fairminded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied and the jury's verdict allowed to stand.

Puckett Mach. Co. v. Edwards, 641 So. 2d 29, 33 (Miss. 1994) (citations omitted). With this standard of review in mind, we must consider the correct law to be applied and then examine the facts adduced at trial in that context.

The trial court granted a J.N.O.V. because as a matter of law and overwhelming evidence it answered "no" to each of the following three questions: (1) was the elder Love competent to enter into a

forward sale contract with Dawkins; (2) was Love a "merchant" within an exception to the statute of frauds; and (3) did Dawkins suffer any damages? If a jury issue existed on all of these issues, then the verdict was correct. If, however, the evidence was overwhelmingly in favor of concluding that the answer to any of the issues was in the negative, then the trial court appropriately entered a J.N.O.V. We conclude that, while there was sufficient evidence to support the jury's verdict on the issues of competence and the merchant's exception, the jury's damages award was contrary to the overwhelming weight of the evidence. We consider each issue.

3. *Competence*

Competence of the parties is a necessary element of a valid contract. *See Merchants & Farmers Bank v. State ex rel. Moore*, 651 So. 2d 1060, 1061 (Miss. 1995) (citation omitted). L & L Planting's answer to the Dawkins's complaint alleged that on August 22, 1986, the date on which Dawkins spoke to Love concerning the forward sale, Love was hospitalized and suffering from a terminal illness from which he would soon die. L & L Planting further alleged that because of Love's health and the medication he was taking, he was neither physically nor mentally capable of making any rational business decision or entering into any oral agreement.

In overturning the jury's verdict, the trial judge concluded that "the evidence was overwhelming, if not uncontradicted, that J. P. Love was mentally incompetent during the pertinent time frame due to medication and a terminal illness, from which he died only a matter of days following his telephone conversation with Dawkins [in which he agreed to the forward sale]." The court further concluded:

The uncontradicted testimony of all witnesses who were closely associated with J. P. Love during his fading days was that he was totally incompetent to make any rational business decisions. His personal physician, Dr. John Downer, frequently saw Mr. Love in the hospital as well as visits to his residence during the final weeks of his life, and Dr. Downer, who was in the best position to determine Love's mental condition, testified unequivocally that Love was "disoriented" and "quite confused" during the final weeks of his life. It is the opinion of this Court, therefore, that J. P. Love was incapable of contracting, and certainly incapable of meeting the standards of a merchant under § 75-2-201 by responding in writing to any written confirmation of a prior oral conversation with regard to the sale of his cotton.

On L & L Planting's motion for J.N.O.V., the trial judge was faced with determining whether the evidence was so overwhelmingly contrary to the verdict that a jury could not have found Love to have been competent. Our review of the record reveals that there was sufficient evidence from which a jury could properly have found competence. Dawkins and his employees testified that Love appeared to be competent and that he had a thorough command of his business affairs. Love's son himself testified that Love was able to attend to some business in his final days. Love called Dawkins to initiate the agreement to sell his cotton crop. Accordingly, the jury's verdict, implicitly finding competence, was not contrary to the overwhelming weight of the evidence. There was, in sum, adequate evidence for the jury to have reached either conclusion. *See, e.g., Mullins v. Ratcliff*, 515 So. 2d 1183, 1190 (Miss. 1987) (citations omitted) (considering competency to execute deeds).

4. *Merchant's Exception to Statute of Frauds*

The statute of frauds requires that certain agreements be reduced to a signed writing to be enforceable. Miss. Code Ann. § 75-2-201(1) (1972). Recognizing the realities of certain business transactions, the statute excepts from this requirement agreements made between "merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know of its contents" *Id.* § 75-2-201(2). In this case, Love called Dawkins on the telephone and offered to sell his cotton crop on a forward sale basis. Dawkins accepted the offer and reduced the agreement to a writing that was delivered to Love and his son in a reasonable time. The question remains, does the evidence support the jury's conclusion that Love was a "merchant"?

Mississippi defines a "merchant" as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." Miss. Code Ann. § 75-2-104 (1972). Farmers are not excluded from the class of persons who may be "merchants." *Vince v. Broome*, 443 So. 2d 23, 25 (Miss. 1983). As the supreme court noted:

[S]ome farming operations are worth millions of dollars. These farmers are engaged in multi commercial transactions and are generally considered to be agribusiness persons. It would stretch the imagination to conclude that all these operations were exempt from coverage under the Commercial Code.

On the other hand, some farming operations are performed by such casual and inexperienced sellers that they would not be included within the merchant definition.

Id. We conclude that the jury properly followed the weight of the evidence. Love was not a casual and inexperienced seller. Far from it.

Love had been in the cotton business for many years. He operated a large farm of over one thousand acres and had been actively involved in researching the market for his crop. Testimony at trial indicated that he had long been involved in efforts to sell directly into the market without the necessity of losing profits through cotton brokers. This evidence strongly supports the jury's conclusion that Love was a merchant. Consequently, a signed writing was not necessary to validate an agreement between L & L Planting and Dawkins.

5. *Damages*

Having concluded that the jury's verdict on the issues of competence and the statute of frauds was supported by the evidence, we go further to consider whether the damages awarded to Dawkins was consistent with the provisions of the Uniform Commercial Code. The J.N.O.V. was in part based on a conclusion that the jury's finding of damages was unsupported by the evidence. The central question on damages is this: did Dawkins, in the dynamic and risky commercial venture that he undertakes each year, lose money for reasons unrelated to L & L Planting's failure to deliver cotton? If so, those damages cannot be passed on to L & L in this suit.

Dawkins was quintessentially a middle-man. L&L Planting agreed on August 22, 1986 to sell to Dawkins all of its crop that was picked by January 15, 1987. Even prior to that purchase, Dawkins had entered contracts with Sumitomo to deliver cotton in December 1986. Dawkins simultaneously was buying cotton from many different growers and selling to many different buyers, trying to match the anticipated quantities, quality, and dates of delivery as best he could. For the sale to Sumitomo, Dawkins apparently was depending on most or all of L & L Planting's cotton being delivered prior to January 15.

On October 8, 1986, when Love's son informed Dawkins that he was not going to honor the agreement and that he had sold the cotton to another buyer, Dawkins says no anticipatory repudiation of the contract occurred. The Mississippi Supreme Court held that "in order to give rise to an anticipatory breach of a contract the defendant's refusal to perform must have been positive and unconditional." *Little v. Dalrymple*, 242 Miss. 365, 371, 135 So. 2d 403, 405 (1961)(pre-U.C.C. case). Love's son not only said that he was not going to honor the contract, he told Dawkins that honoring the contract was impossible by virtue of his sale of the cotton to another buyer. He also told Dawkins not to call him anymore.

As an Illinois court stated when a grower made an anticipatory repudiation of a futures contract for grain, when the repudiation is unequivocal and cover easily available, the time for the buyer to seek cover or have his damages measured is immediate. *Oloffson v. Coomer*, 296 N.E.2d 871, 874-75 (Ill. 1973). As that court said:

[The buyer] knew or should have known on [the date of repudiation], the limit of damages he would probably recover. If he were obligated to deliver grain to a third party, he knew or should have known that unless he covered on [the date of repudiation], his own capital would be at risk with respect to his obligation to his own vendee.

Oloffson, 296 N.E.2d at 875. The court concluded that the buyer had a duty to cover or be limited to damages computed on the difference between the market price on the date of repudiation and the contract price, plus incidental and consequential damages. *Id.*

Dawkins responds in two ways, one factual and the other legal. Dawkins testified that Love might still have delivered the cotton to him if the market price started to go down. In other words, Love might have retracted his repudiation and, Dawkins says, forced the acceptance of L & L Planting's cotton. However, the contract is a two-way obligation. Love's unequivocal repudiation terminated any obligation on Dawkins' part to accept delivery even had Love later tried. Dawkins in effect is arguing that no matter how firm and unequivocal a statement might be (and what more Love could have said is difficult to imagine), there never can be an unconditional repudiation.

The jury was instructed that they should determine whether Dawkins "was reasonably justified in waiting" until December, but the concept of unconditional repudiation was never explained to them. This is not a fact question for the jury, but a conclusion of law based on undisputed facts. As discussed in *Oloffson*, which we find persuasive, an unambiguous and unequivocal repudiation begins the other contracting party's obligations either to cover or to be held to damages measured as of the date of repudiation. There is no commercially reasonable period to await delivery in such an event.

Dawkins relies on a case in which there was no clear statement in the record, oral or in writing, by which the seller informed the buyer that he would not be delivering the goods. *Gooch v. Farmers Marketing Ass'n.*, 519 So. 2d 1214, 1215 (Miss. 1988). The buyer testified that the seller never gave notice that he wished to cancel the contract. *Gooch*, 519 So. 2d at 1215. It is from this opinion that Dawkins quotes the statement that determining "the time when the buyer learns of the breach is for the trier of fact." *Id.* at 1218. All that means is that when there is a question of fact, the trier of fact answers it. Here there is a question of legal effect of undisputed facts -- does an unequivocal statement that the buyer has sold the contracted-for goods to someone else constitute an unconditional repudiation or not? For the reasons explained in *Oloffson*, we hold the breach to be present as a matter of law no later than October 8.

Written into every contract are the terms of the U.C.C. Even a non-breaching party cannot ignore obligations imposed by that set of statutes, obligations as real and enforceable as if they were contract terms. The U.C.C. anticipates breaches, and parties must act accordingly.

The second argument Dawkins makes is that when "a valid reason exists for failure or refusal to cover, damages may be calculated from the time when performance is due." *Cargill, Inc. v. Stafford*, 553 F.2d 1222, 1227 (10th Cir. 1977). The same authority holds that the general rule is that when "substitution is readily available and buyer does not cover within a reasonable time, damages should be based on the price at the end of that reasonable time rather than on the price when performance is due." *Cargill*, 553 F.2d at 1227. The date is important since the cotton market was rising from October through December. The unrebutted testimony is that "substitution" was readily available, that there was all the Mississippi Delta cotton in October that anyone would want to buy. In fact, the issue is how much that cotton would cost, not whether it was available. A reasonable time after October 8, which because of the readily available cover would be October 9 or very soon thereafter, remains the date that Dawkins had to act. [\(1\)](#)

When a contract is irretrievably repudiated, the aggrieved party may select one of two options. *See*, Miss. Code Ann. § 75-2-610 (1972). The first is seeking cover by purchasing substitute goods on the market without reasonable delay. *Id.* §§ 75-2-711, 712(1). He may then seek damages from the breaching party calculated by subtracting the contract price from the cost of the substitute goods. *Id.* § 75-2-712(2). Dawkins put on expert testimony that even if the contract was effectively repudiated in October, a reasonable buyer might have continued to wait in order to see if the market dropped again. Dawkins's proof was that the October 9 price, had he bought on the spot market at that time, was 45.95 cents. There was testimony that Dawkins did not want to "lock in" his loss by entering a new purchase contract; in other words, he would lose money at 45.95 cents per pound, and he still hoped that the market would drop.

Cotton buying is a high-risk business. A reasonable risk-taker may have waited to see if a better bargain could be acquired later. That is particularly likely when the non-breaching party on the date of repudiation would suffer a loss for reasons unrelated to the breach. The Commercial Code does not require that a contracting party buy substitute goods, but neither does the Code take a "wait-and-see" attitude on damages. Dawkins would have the measure of damages be the cancellation charge to Sumitomo. Instead, by statute Dawkins's entitlement to damages if he does not cover is "the difference between the market price at the time when the buyer learned of the breach and the contract

price together with any incidental and consequential damages provided in this chapter (Section 2-715), but less expenses saved in consequence of the seller's breach." Miss. Code Ann. § 75-2-713 (1) (1972); *Gooch*, 519 So. 2d at 1217-18. The U.C.C. in other words puts Dawkins in the position he would have been had there been no breach, but it does not improve his position.

Dawkins's damages theory was this: 1) There was a binding contract. 2) No effective cancellation occurred, not on August 25 nor on October 8, and thus Dawkins never could cover. Of course, we have held that there was an unequivocal repudiation on October 8. 3) Dawkins would pass that barrier by arguing that even if the contract clearly was canceled, cover was never commercially reasonable because of the volatile cotton market. 4) Dawkins's damages for his inability to deliver the cotton was computed by determining what percentage of Dawkins's overall cotton delivery shortfall to Sumitomo was represented by the quantity of cotton that would have come from L & L Planting (Dawkins not only was unable to provide the quantity of cotton he was expecting from L & L Planting, he was also short by 1,000 additional bales). That percentage was then multiplied by the cancellation charges he had to pay Sumitomo. Dawkins's witnesses explained that the charge was based on the difference between the market price on December 11, 1986 when Sumitomo declared Dawkins in default, and the market price when Dawkins entered his contracts with Sumitomo. This resulted in a payment of \$512,890 for failure to deliver 3,583 bales. L & L Planting's crop was 2,584 bales that year, which was sold elsewhere. Dawkins alleged that L & L should pay $2,584/3,583 \times \$512,890$. That number is \$369,899.60, which is what the jury awarded.

The most obvious initial observation is that the U.C.C. calculates damages by reference to the contract that is breached, i.e., the L&L-Dawkins contract, while Dawkins is showing damages under an entirely separate contract. For example, nowhere in Dawkins's payment of damages to Sumitomo is the amount that he would have paid L & L Planting a factor, i.e., the contract price under the breached contract is nowhere to be seen. If Dawkins was going to lose money on the contract with Sumitomo even had L & L Planting delivered, Dawkins makes no allowance for it. Moreover, the question is not what cotton was selling for on the spot market or futures market in August when the Sumitomo (and L & L Planting) contracts were entered. The important number is what Dawkins would have had to pay to use L & L Planting cotton in order to fulfill its contract with Sumitomo. Because of then-new federal farm legislation, that amount was not based on August market prices. No one ever testified as to what Dawkins would have had to pay for L & L Planting's cotton, and compared it to the price of cotton that was available at the time of repudiation. It is irrelevant whether Dawkins had a contract to sell L & L Planting's cotton or not, except for consequential damages as will be discussed below. Miss. Code Ann. § 75-2-715 (2)(a) (Supp. 1996).

By order of April 15, 1997, we requested that the parties provide information and argument regarding what is in the record on the price Dawkins would have had to pay had the contract been performed, and the relevant market price on October 9. The following reflects the parties' responses.

Under the August 22 contract between Dawkins and L & L Planting, Dawkins agreed that he would pay L & L Planting \$10 per bale, or 2 cents a pound (bales are 500 pounds), for the right to buy Love's cotton. The remainder of the amount that L & L Planting would receive was a result of a federal cotton program in which L & L Planting had the right to participate. A new federal farm bill was adopted on December 23, 1985. Pub.Law 99-198, 99 STAT. 1354. That statute set the rules that control what L & L Planting and Dawkins agreed to do in August, 1986. A cotton support

program had existed for decades with periodic changes, but the 1985 act was sufficiently different that several witnesses at trial testified as to the confusion that it created. The problem that this legislation was intended to ameliorate was that American cotton was too high-priced for the world market. The result was frequent defaults under the federal crop loan programs, as cotton growers could not sell their cotton for enough to pay off their loans.

The new farm bill guaranteed a price to the grower, i.e., the guarantee was to L & L Planting, not to Dawkins. The guarantee was in the form of a loan at a set price per pound of cotton. The statute set the amount of the loan for the first crop year, and thereafter the Secretary of Agriculture would set and publish notice of the loan rate. 7 C.F.R. §1427.8 (1987). The loan on the relevant cotton here was 55.95 cents per pound, adjusted for the grade of cotton. The loan would be made after the cotton was harvested, as warehouse receipts indicating the grade and weight of the cotton were needed. 7 C.F.R. § 1427.12 (1987). That 55.95 cents was the federal government's guarantee, and was only indirectly connected with what Dawkins would have to pay. Dawkins's agreement to pay two cents per pound for the rights to buy that cotton would give the seller 57.95 cents per pound. There was no quantity stated, but Dawkins was buying all "acceptable cotton" from 1300 acres picked by January 15, 1987.

The new bill provided the tools to make American cotton more competitive. A loan repayment rate was established that obligated the producer only to pay back part of the loan. A producer could repay the loan at the lesser of:

(I) the loan level determined for such crop; or

(II) the prevailing world market price for upland cotton (adjusted to United States quality and location)

Food Security Act of 1985, Pub. L. No. 99-198, Sec. 501, § 103A(a)(5)(c)(I), 99 Stat. 1354, 1408. Only 80% of the loan had to be repaid. Thus if the price in the world market in which American cotton was competing was less than 80% of 55.95 cents per pound, the repayment amount would be at the world price; else the repayment was at 80% of 55.95. Since the loans were non-recourse, this right of repaying less than all the loan was to encourage producers to sell the cotton for the best price that they could, instead of just defaulting on the loans if they could not sell for at least the loan amount. *Id.* at 1407-1419. If the world price was *lower* than the loan repayment level (80% of the loan price of 55.95 cents), then individuals such as Dawkins who purchased a grower's cotton had only to pay: 1) the world price and 2) the premium to the grower for the right to the cotton. Here, Dawkins agreed to pay 2 cents per pound. What else Dawkins would have to pay, and what deficiency the government would have to make up, would not conclusively be determined until the cotton matured, was delivered to a warehouse, and was ready for Dawkins to purchase.

Dawkins had contracted with Sumitomo to provide cotton at basically 29.5 cents per pound. The explanations of the farm bill made by both parties prior to the supplemental briefing on rehearing made it appear that Dawkins could get L & L Planting's cotton for less than 29.5 cents only if the world price by the time of delivery had dropped below that price. If the world price remained high, Dawkins was going to have to pay 80% of the loan price (.8 x 55.95) plus the two cent premium, or 46.8 cents per pound. At that price, he would lose 17 cents per pound on his Sumitomo contracts.

Dawkins needed the market to do what the testimony showed most people expected -- this new marketing program would glut the market with cotton and cause a big price drop. One witness even stated that some predicted the price would get close to ten cents a pound. If the world price dropped anywhere near that amount, Dawkins's gamble would have paid off handsomely. If it did not, the only question was how much money he was going to lose, whether L & L Planting delivered or not. Thus from the beginning Dawkins was speculating that the world price would drop by the time he was to deliver the cotton. He desperately needed a drop in the world price so that the world price, not 80% of the loan price, would be the payment. Dawkins cannot make L & L Planting responsible for the part of his predicament that arises from the initial gamble that he made to sell for 29.5 cents.

Dawkins addresses for the first time in his response to our request for additional briefing during the pendency of a petition for rehearing in this court a matter never brought up in the trial court, in earlier briefs to this court, nor in his petition for rehearing. Dawkins argues that a feature of the 1985 act complemented the marketing support program already discussed. It gave middlemen such as Dawkins an extra incentive if the world price remained below 80% of the loan amount:

(ii) The Commodity Credit Corporation, under such regulations as the Secretary may prescribe, shall make payments, through the issuance of negotiable marketing certificates, to first handlers of cotton (persons regularly engaged in buying and selling upland cotton) . . .

(iii) The value of each certificate issued under clause (ii) shall be based on the difference between--

(I) the loan repayment rate for upland cotton . . . [which was 80% of 55.95 cents]; and

(II) the prevailing world market price of upland cotton, as determined by the Secretary under a published formula . . .

Id., 99 Stat. at 1409. Attached to Dawkins's supplemental brief filed on rehearing was a print-out indicating week-by-week the average world price. Through this Dawkins attempts to show that he would have been entitled to extra governmental payments during some of the period in question. What dates are relevant, however, arise from the regulations promulgated for the program. 7 C.F.R. §§1427.50-1427.55 (1987). These regulations make it appear that the cotton must have been harvested and delivered to a warehouse before any computations are made. The parties can address this and other issues (including whether Dawkins even participated in the program on other purchases) to the extent either believes commodity certificates for first handlers are relevant.

L & L Planting moved to strike the references to the "first handlers," arguing that none of this was previously raised. Dawkins asserts that the extra documentation and legal references are appropriate to prove that Dawkins would not have lost money had the L & L Planting contract been performed. Of course, to the extent the documentation and argument are necessary to prove Dawkins's damages, then they should have been introduced at trial. Some of the information, most notably the exhibit that is the last page of the addendum, is improper supplementation of facts. Overall, however, the brief provides review of the controlling statutes. By separate order we deny the motion to strike.

This case went to the jury on an inappropriate set of instructions on damages. We must decide the effect of having the wrong instructions, and to some extent even, the wrong evidence to prove

damages. When "instructions, considered as a whole, do not properly advise the jury of the elements of damages that may be considered," the supreme court has ruled that a verdict in favor of the plaintiff is to be reversed and the cause remanded for a new trial or other proceedings. *Gerodetti v. Broadacres*, 363 So. 2d 265, 267 (Miss. 1978). When liability has properly been found on contested evidence, the new trial is solely on damages. *Atwood v. Lever*, 274 So. 2d 146, 149 (Miss. 1973). A defendant may with some justification find unfairness that a plaintiff gets to try again, but the defendant cannot seek a new jury's different view on liability. One response is that an appellate court lets stand what is affirmable and reverses what is not. In addition, even though it is not the defendant's burden to present the correct instructions on the plaintiff's case, *Pulliam v. Ott*, 246 Miss. 739, 745, 150 So. 2d 143, 146 (1963), a defendant who perceives that the wrong instructions are being presented can make the strategic decision that everyone's best interest would be served by raising the proper ones. That strategy can result in earlier action, such as a pre-trial determination of the proper legal theory for damages.

We therefore reverse and remand for a new trial on damages. There was an unconditional repudiation of the valid contract on October 8. Dawkins decided not to cover. His damages are limited to the difference between the contract price and the price of the same quality goods on the date of repudiation, plus incidental and consequential damages. As already mentioned, the clearest proof of the cost of a new contract would be the cost on October 9 to buy the cotton of another grower who was willing to participate in the loan program. On the day of L & L Planting's unambiguous repudiation of its agreement to deliver the right to buy L & L Planting's cotton out of the loan program -- a right Dawkins had paid two cents per pound to obtain -- was the market price to purchase an identical right from someone else five cents per pound, or one cent, or some other figure? Such proof may be difficult to obtain in the absence of market quotations, but cannot be ignored. Miss. Code Ann. § 75-2-724 (1981). The fluctuating rest of the contract price, based on market conditions, would not have varied from what he would have had to pay for L & L Planting's cotton, and for a new producer's cotton. Thus if contracts buying other growers' cotton out of the loan program were available, comparing the price of the L & L Planting cotton (2 cents x 500 pounds x 2584 bales) to the price for others in October (e.g., 5 cents x 500 pounds x 2584 bales) is the computation to be made, together with incidental and consequential damages.

However, Dawkins argues in his brief -- but presented no evidence at trial -- that these contracts were unavailable in October. There were other ways to buy cotton, and Dawkins showed the spot market price. It is important to keep in focus that even if there were several commercially reasonable ways to buy cotton that October, Dawkins in fact chose none of them in 1986. Instead he proved at trial a possible way to purchase cotton that is different than the way under the breached contract. It is the plaintiff's burden to prove damages. We analogize to a contract for the outright purchase of equipment, but before performance is due the seller notifies the buyer that he is renegeing on the sale. The buyer does nothing, but in future litigation attempts to prove his damages by showing what a lease-purchase of the equipment would have cost. A predicate for that evidence is needed. Similarly, if the contract that was breached was to buy the right to purchase a farmer's cotton out of the loan program, a reason must be given for the failure to show what such a contract would have cost at the time of repudiation. L & L Planting can counter any of this evidence by its own showing of what choices were available and what was commercially reasonable.

If it was not commercially reasonable or possible to get an identical kind of contract when the

repudiation occurred (i.e., if two cents for the old contract cannot be contrasted with five cents or one cent for a new one), then a more difficult comparison must be made. The spot market or other commercially reasonable price on October 9 must be compared to the total costs that Dawkins would ultimately have paid had there been no breach. The only date in the contract that relates to delivery is that Dawkins would take no cotton picked after January 15, 1987. The parties appear to agree that most of the cotton would have been delivered sooner. The parties' evidence should contend with the date that L & L Planting under the contract reasonably would have delivered the cotton, or different parts of its harvest, and then reveal under the loan equity program what Dawkins would have had to pay to get that cotton at that time. The dates that L & L Planting actually delivered the cotton that crop year have at least some relevance.

There was considerable discussion at trial regarding other charges to be added to the base contract price. These included warehouse and shipping costs. It would appear that such costs are the same regardless of the kind of contract -- spot market or buying a farmer's loan equities. That, however, is for the parties to address on remand.

There is still the question of incidental and consequential damages. "Incidental damages" are such costs as "inspection, receipt, transportation, and care and custody of goods rightfully rejected. . ." Miss. Code Ann. § 75-2-715 (1). There was no evidence of that kind of damage. If going into the spot market in October was commercially reasonable and Dawkins had actually done so, then incidental damages would have included warehouse storage, costs associated with either having to borrow or otherwise apply sufficient capital to make the purchase, and other similar costs. However, those costs were not incurred. "Consequential damages" are losses "which could not reasonably be prevented by cover or otherwise." *Id.*, § 75-2-715 (2)(a). The charges paid Sumitomo were for non-delivery, i.e., for failure to have the cotton required under Dawkins's separate contract with that company. That is precisely the kind of damages that would not have arisen had Dawkins covered. There is no obligation under the U.C.C. to cover, but failure to do so limits the damages.

We remand the case for further proceedings on damages. To the extent fact questions are involved, this would require a new trial. One figure necessary to compute damages is the price on October 9 to purchase substitute cotton, which would be the cost to purchase another farmer's loan equities unless either party proves that such a contract was unavailable or commercially unreasonable. That price must be compared to what Dawkins would have paid for L & L Planting's cotton. If there were contracts available in October for purchasing cotton out of the loan program, then what is being compared is the two cents under L & L Planting's contract to some similar figure for a new contract. However, if those contracts are inapplicable, then it must first be determined when L & L Planting's cotton reasonably would have been delivered, and second, what Dawkins's cost under the farm bill for that cotton on that date or dates would have been. Whether there were any incidental or consequential damages can then be assessed.

THE PETITION FOR REHEARING IS GRANTED. THE JUDGMENT OF THE HOLMES COUNTY CIRCUIT COURT IS REVERSED AND RENDERED AS TO LIABILITY, AND THE CAUSE REMANDED FOR FURTHER PROCEEDINGS ON DAMAGES. COSTS OF THIS APPEAL ARE TAXED ONE-HALF TO THE APPELLANT AND ONE-HALF TO APPELLEES.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, AND PAYNE, JJ., CONCUR.

HERRING AND HINKEBEIN, JJ., NOT PARTICIPATING.

1. We note that, after Dawkins's employee returned from L & L Planting in August without a signed contract, Dawkins sent a letter to Love seeking to confirm the arrangement and to procure a signed contract. That letter could be seen as correspondence seeking adequate assurances that the contract would be performed. Miss. Code Ann. § 75-2-609 (1972). Under such a view, Love would have had thirty days from his receipt of the letter to provide adequate assurances of performance. Otherwise, the contract would be seen as repudiated. Love never gave any assurances within the thirty-day time period which expired a few days prior to his son's indication that the cotton had been sold to another buyer. Accordingly, the contract could have been repudiated earlier. However, neither party contended that a section 609 letter was sent.